APR 28 1981
ALEXANDER L. STEV

No. 80-1461

In the Supreme Court of the United States

OCTOBER TERM, 1980

CLEAR PINE MOULDINGS, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether substantial evidence supports the Board's findings that petitioner failed to bargain in good faith with the union by engaging in dilatory tactics in order to delay reaching agreement until its competitors had reached a wage settlement and by unilaterally changing its health and welfare insurance plan.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is reported at 632 F.2d 721. The decision and order of the National Labor Relations Board (Pet. App. A) are reported at 238 N.L.R.B. 69.[1]

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[1] Since petitioner's appendix is not consecutively numbered, "A1-A3" will refer to the decision and order of the Board, and "JD1-JD26" will refer to the decision of the administrative law judge (both reproduced as Appendix A to the petition). "B1-B19" will refer to the opinion of the court of appeals.

JURISDICTION

A petition for rehearing was denied on November 24, 1980 (Pet. App. C). The petition for a writ of certiorari was filed on February 20, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

One relevant provision of the National Labor Relations Act, 29 U.S.C. 151 *et seq.*, is set out in the petition (Pet. 3). In addition, Section 8(d), 29 U.S.C. 158(d), provides in pertinent part that:

> * * * to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement * * *.

STATEMENT

1. The last of a series of collective bargaining agreements between petitioner and the Union[2] was due to expire on June 1, 1977 (Pet. App. JD2).[3] On March 14, the Union sent its initial new contract demands to petitioner. Between May 16 and August 1, when the Union struck, the parties engaged in five bargaining sessions (*id.* at JD3, JD9).

At the June 9 bargaining session, petitioner explained that its competitors were other moulding companies in Northern California, which had collective bargaining agreements that did not expire until August, September or October 1977. It suggested postponing contract negotiations until those companies had signed new contracts. The Union emphasized that it wanted to bargain immediately and demanded to know if petitioner were unwilling to negotiate until its competitors signed contracts. Petitioner indicated that it would negotiate, but that it would not be the first within its industry to sign a contract since it had "been a leader" in 1975 and had suffered a competitive disadvantage as a consequence (Pet. App. JD9-JD11 & n.7). At subsequent bargaining sessions, petitioner continued to complain about the unfair position in which the Union was placing it. At the June 24 session, petitioner suggested an interim agreement that would expire after its competitors had reached agreement with their unions. The Union responded that it wanted to negotiate with petitioner, not its competitors, but said

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[2] International Woodworkers of America, Local No. 3-200, AFL-CIO.

[3] All dates referred to hereinafter were in 1977.

that it was willing to discuss any proposal offered by petitioner (*id.* at JD11-JD12).

At the next bargaining session, held on July 8, petitioner submitted an interim proposal, which was rejected by the Union. That interim proposal provided, *inter alia*, for a renewal of the prior agreement for 60 days and thereafter until either party gave 10 days written notice of termination and that all general wage increases negotiated would be retroactive to June 1 (Pet. App. JD12-JD13). A modified interim proposal was rejected by the Union on July 26 (Pet. App. JD13-JD14). Throughout the negotiations, however, petitioner refused to make any proposal on economic issues, notwithstanding the Union's repeated requests that it do so (*id.* at JD14, JD17).

On October 14, petitioner finally presented a proposal of an 8% wage increase and the purchase of a health and welfare plan equivalent to the former plan. Petitioner, however, already had implemented the latter proposal by purchasing a health and welfare plan from Aetna, effective October 1, without notifying the Union (Pet. App. JD14-JD15).[4]

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[4] At prior bargaining sessions the Union had proposed increasing the health and welfare and pension rates to those provided for in the Timber Operators Council, Inc.—IWA Health and Welfare and Pension Trusts (TOC-IWA trusts), to which petitioner had been contributing under the prior agreement. Petitioner refused to contribute at the new, higher levels (Pet. App. JD11, JD13-JD14).

During the course of the bargaining sessions, petitioner and the Union ascertained that the TOC-IWA trusts would not continue to accept contributions at the prior levels (Pet. App. JD12-JD13). In response to that fact, petitioner unilaterally purchased the new plan from Aetna (*id.* at JD15).

2. The administrative law judge found (Pet. App. JD17) that petitioner "with the purpose of delaying an agreement until it could get a reading on the wage settlements which were expected to be reached by its Northern California competitors during the late summer and fall of 1977 * * * engaged in dilatory, surface bargaining with the Union." In so finding, the ALJ noted (*id.* at JD19) that petitioner "never made an economic offer until October 14," at which "point a sufficient amount of time had passed so [petitioner] could see what had occurred in Northern California." The ALJ found that, after the Union rejected petitioner's request that bargaining be put off until after the Northern California settlements, petitioner insured that result by stalling on responding to the Union's proposals and using up time by proposing an interim contract that it knew the Union would reject (*id.* at JD17-JD19).

Concerning the unilateral purchase of a new insurance plan, the ALJ rejected petitioner's assertion that a bargaining impasse over the provision, entitling it to act unilaterally, had been reached (Pet. App. JD20-JD21). The ALJ also noted that, "[d]espite [General Manager] Turner's belief that coverage offered by the private carrier is identical to that previously offered by TOC-IWA, he conceded that he did not know whether that was exactly true" (*id.* at JD15).

The Board, adopting the "rulings, findings, and conclusions" of the ALJ, found that petitioner had violated Sections 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing to bargain in good faith with the Union until petitioner's competitors had agreed upon wage settlements with their em-

ployees and by unilaterally changing its health and welfare insurance plan (Pet. App. A1-A2; JD23-JD24).[5]

3. The court of appeals upheld the Board's findings and enforced its order (Pet. App. B19). The court stated as follows (Pet. App. B14):

> While a union and employer may agree voluntarily not to bargain until the conclusion of negotiations involving competitors, an employer violates §§ 8(a)(5) and (1) by refusing unilaterally to bargain until his competitors complete their negotiations. *See United Mine Workers* v. *Pennington*, 381 U.S. 657, 666-67 (1965). Moreover, good faith bargaining presupposes a desire to enter ultimately into a collective-bargaining contract. While this duty does not require an agreement, it does prohibit mere pretense at negotiations with a closed mind and without a spirit of cooperation and good faith.

The court of appeals found that substantial evidence supported the Board's finding that petitioner had engaged in such a pretense in order to postpone bargaining until its California competitors had negotiated their agreements. In so finding, the court, as had the Board, rejected petitioner's claim that the progress it had made in negotiations, particularly

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[5] The Board also found that petitioner's bad faith bargaining directly caused the Union's strike and that employees who engaged in the strike were therefore unfair labor practice strikers; that petitioner had violated Sections 8(a)(3) and (1) by discriminatorily reprimanding an employee, and Section 8(a)(1) by interrogating two employees about their reasons for joining the Union and by threatening a third with adverse treatment should he join the Union (Pet. App. A1-A2; JD23). The court of appeals upheld these findings (Pet. App. B2-B8), and petitioner does not challenge them here.

concerning the terms of the interim agreement, "belie[d] the finding that it did not present economic proposals" (Pet. App. B15). The court explained (Pet. App. B15-B16):

> Without evaluating the merits of the substantive terms of the collective bargaining proposals, it is still apparent that [petitioner] never made specific economic proposals until October 14, five months after negotiations commenced and shortly after the Northern California companies had signed their contracts. In fact, the employer made no proposals except for a sketchy interim agreement which, it later admitted, it knew would be unacceptable. It is true that the company discussed the union's various proposals, but it never presented concrete counterproposals when requested to do so. Rather, it complained of having to negotiate prior to its competitors. The negotiations on an interim agreement did not justify the company's refusal to propose terms for the long-term contract. The parties never agreed to postpone negotiations on the long-term contract and indeed the union requested company proposals at every meeting without success.

The court of appeals further agreed that the Company's unilateral implementation of the Aetna plan was unlawful, in light of the absence of record evidence that the new plan was identical to the old one. As the court stated (Pet. App. B17):

> We recognize that the company was placed in a tight spot by the health and welfare trusts' eventual refusal to accept contributions that did not meet the industry settlement. To preserve any health coverage for its employees, [petitioner] had to make a decision. We cannot, how-

ever, condone [petitioner's] conduct in offering to negotiate about a plan that it had, in fact, already unilaterally adopted.

ARGUMENT

1. Sections 8(a)(5) and 8(d) of the Act, 29 U.S.C. 158(a)(5) and 158(d), require an employer to bargain "in good faith" with the chosen representative of its employees with respect to hours, wages, and other terms and conditions of employment. In determining whether an employer has met that obligation, the Board is to consider, among other factors, whether the employer's "conduct at the bargaining table evidences a real desire to come into agreement." *NLRB* v. *Insurance Agents' Union*, 361 U.S. 477, 498 (1960); accord, *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 402 (1952) ("performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences"). More specifically, this Court has made clear that an employer violates the Act by refusing to bargain " 'because he envisions competitive disadvantages accruing from such bargaining' " or by conditioning bargaining on the prior conclusion of agreements by his competitors. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 667 (1965), quoting *American Range Lines, Inc.*, 13 N.L.R.B. 139, 147 (1939).

Petitioner's contention (Pet. 15-17) that an employer may lawfully insist upon a delay in making an economic offer in order to protect its competitive position is without any case support. The authorities cited by petitioner establish only that a party may lawfully insist upon a proposal that its wages and benefits will be identical to those at another plant

(*General Teamster, Local 126*, 176 N.L.R.B. 406, 407-408 (1969)), or a proposal that its wages and benefits will be adjusted automatically if the union agrees to lower rates with another employer (*Dolly Madison Industries, Inc.*, 182 N.L.R.B. 1037, 1038 (1970)). However, a party cannot condition bargaining upon a review of its competitors' contract settlements. *United Mine Workers* v. *Pennington, supra.* Here, petitioner did not propose to tie its wage increases to those negotiated by its competitors nor did it agree to a wage increase subject to adjustment later. Instead, it delayed making any economic offer for approximately five months in order to protect its competitive position.

Nor is petitioner's deliberate delay in making an economic offer analogous to a refusal to agree to any wage increase (Pet. 10). Whether an employer's adamance with respect to a specific clause is evidence of bad faith or mere hard bargaining is a factual question to be resolved in light of all the surrounding circumstances. *NLRB* v. *Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960).[6] Here, however, the court found (Pet. App. B15) that petitioner's tactics themselves were unlawful, without regard to the merits of the proposals' substantive terms. Delay itself is clear evidence of an intent to frustrate meaningful bargaining See *Continental Insurance Co.* v. *NLRB*, 495 F.2d 44, 48 (2d Cir. 1974).[7]

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[6] Contrary to petitioner's representation (Pet. 10), in *NLRB* v. *Herman Sausage Co., supra,* the Fifth Circuit did enforce the Board's order holding that the employer had violated 29 U.S.C. 158(a)(5) and (1) by refusing to bargain in good faith.

[7] *NLRB* v. *Cummer-Graham Co.*, 279 F.2d 757 (5th Cir. 1960), is not to the contrary, since in that case the Fifth

Petitioner urges that it did in fact make certain economic proposals (Pet. 9-10), that its proposal of an interim agreement demonstrated good faith (Pet. 12-13), and finally and "significantly" (Pet. 15), that it did not insist on, but instead merely proposed, tying its offer to future settlements elsewhere. The Board's and the court of appeals' rejection of this view of the record and petitioner's bargaining tactics presents only an evidentiary issue that does not warrant review by this Court. *NLRB* v. *American National Insurance Co.*, *supra*, 343 U.S. at 409-410; *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). In any event, as shown in the Statement, *supra*, the record amply supports the Board's findings.[8]

2. Contrary to petitioner's contention (Pet. 13-14), the holding of the court below that petitioner's unilateral selection of a new insurance carrier violated the Act does not conflict with *Connecticut Light & Power Co.* v. *NLRB*, 476 F.2d 1079 (2d Cir. 1973). As the court of appeals observed (Pet. App. B17), in *Connecticut Light & Power Co.* there was a specific showing that the former and replacement plans were, in fact, identical, while in the instant case no such showing was made. Petitioner's assertions (Pet. 8, 13-14)—without record references—that the benefits of the two plans were "exactly the same" raises only a factual issue not appropriate for review by this Court.

Circuit merely held that there was insufficient evidence to support the Board's "finding that there were delaying tactics amounting to refusal by the [employer] to bargain in good faith * * *" (*id.* at 760).

[8] Petitioner's version of the negotiations for an interim agreement (Pet. 5-8) was described by the ALJ (Pet. App. JD18-JD19, JD13 n.9) as a "mischaracterization" of the record.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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